

Vinson & Elkins
ATTORNEYS AT LAW

VINSON & ELKINS LLP
1300 FIRST CITY TOWER
1001 FANNIN STREET
HOUSTON, TEXAS 77002-6760
TELEPHONE (713) 755-2222
FAX (713) 755-2346
www.velaw.com

Carol Dinkins
Direct Dial (713) 755-2528
Direct Fax (713) 615-5311
cdinkins@velaw.com

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TO: Patricia Hick, Esq.

FAX: 212/637-3096

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PHONE: 212/637-3137

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The Passaic River Environmental Restoration Initiative Will Not Let Polluters Off the Hook

The Passaic River Environmental Restoration Initiative envisions a dual-track approach over the next few years in which a new, Corps of Engineers-led, WRDA-based public works approach will be conducted on a parallel track with the ongoing EPA-led CERCLA-based process. The Corps and EPA will be partners in this twin effort, with participants from both agencies maintaining a strong awareness of progress on both tracks. It is anticipated that the WRDA feasibility study process will inform the CERCLA RI/FS process, and vice-versa, in a manner that may enable the two processes to be melded at the WRDA ROD and CERCLA ROD stages.

During the WRDA feasibility study process, the Corps will work with the project's non-federal sponsor and other public agencies to develop a proposed apportionment of project costs to the federal government, non-federal project sponsor and private sector entities. The criteria to guide such apportionment will be developed. It is anticipated that the magnitudes of such apportionment will reflect the parties' contributions to the contamination that presently exists in the river, the benefits to be achieved by the project and the range of project restoration measures necessary to achieve the projected benefits.

For public and private sector participants that contribute their full apportioned shares to the clean-up efforts, it is envisioned that the authorizing statute for the restoration project (which will be informed by the recommendations contained in the Chief of Engineers' report resulting from the feasibility study) will resolve their liability for restoration costs. For private sector entities that choose not to contribute their apportioned shares of the cost of the restoration efforts, CERCLA liability will remain. As with every large civil works project, Congress will have the ultimate say regarding apportionment of costs and, in this case, disposition of liabilities.

While it is acknowledged that the process described above will be difficult and may be imperfect, it holds substantially more promise for cleaning up the Passaic River in a faster, fairer, and more effective manner than would a stand-alone CERCLA process. That statement is based on recognition that a stand-alone CERCLA process would continue to encounter extremely high transaction costs (litigation and litigation support costs) and indefinite delays due to several factors, including the following:

- A large component of the contamination of the Passaic River has resulted from private entities presently in the category of "orphan shares" (unidentifiable or bankrupt entities)
- It is likely that another large component of the contamination will be found to be unallocable to PRPs due to the ubiquitous nature of the chemicals involved
- A large component of the allocable, non-orphan contamination of the Passaic River has resulted from municipal discharges representing millions of contributors.
- Currently named PRPs have indicated an unwillingness to voluntarily participate in the CERCLA process on the Passaic River.

In summary, the Passaic River Environmental Restoration Initiative will not let polluters off the hook, but instead will allow the long-delayed restoration of the Passaic to proceed quickly, with polluters paying their fair share of the costs and insuring that both public and private shares of

costs will be devoted to productive clean-up and restoration activities, not to transaction costs.